

this Bill led To The case
known as Williams appeal, 73 Pa 249

No. 1.

July Term, 1871.

IN THE SUPREME COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA.

IN EQUITY.

THE LIBRARY COMPANY OF PHILADELPHIA

vs.

HENRY J. WILLIAMS, ESQUIRE.

BILL.

FILED APRIL 11th, 1871.

To the within-named Defendant, Henry J. Williams:

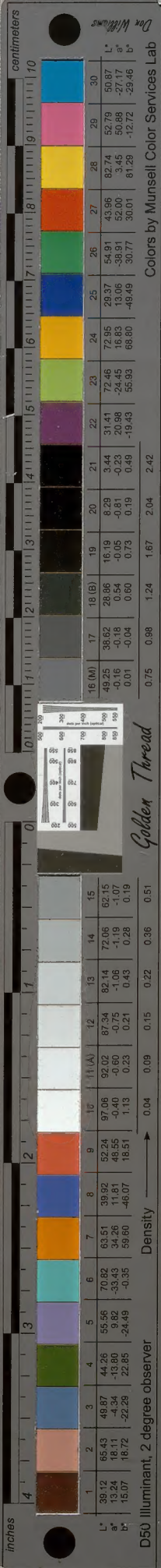
You are hereby notified and required, within fourteen days after service hereof on you, exclusive of the day of such service, to cause an appearance to be entered for you in the Supreme Court for the Eastern District of Pennsylvania, to the within Bill of Complaint of the within-named complainant, and to observe what the said Court shall direct.

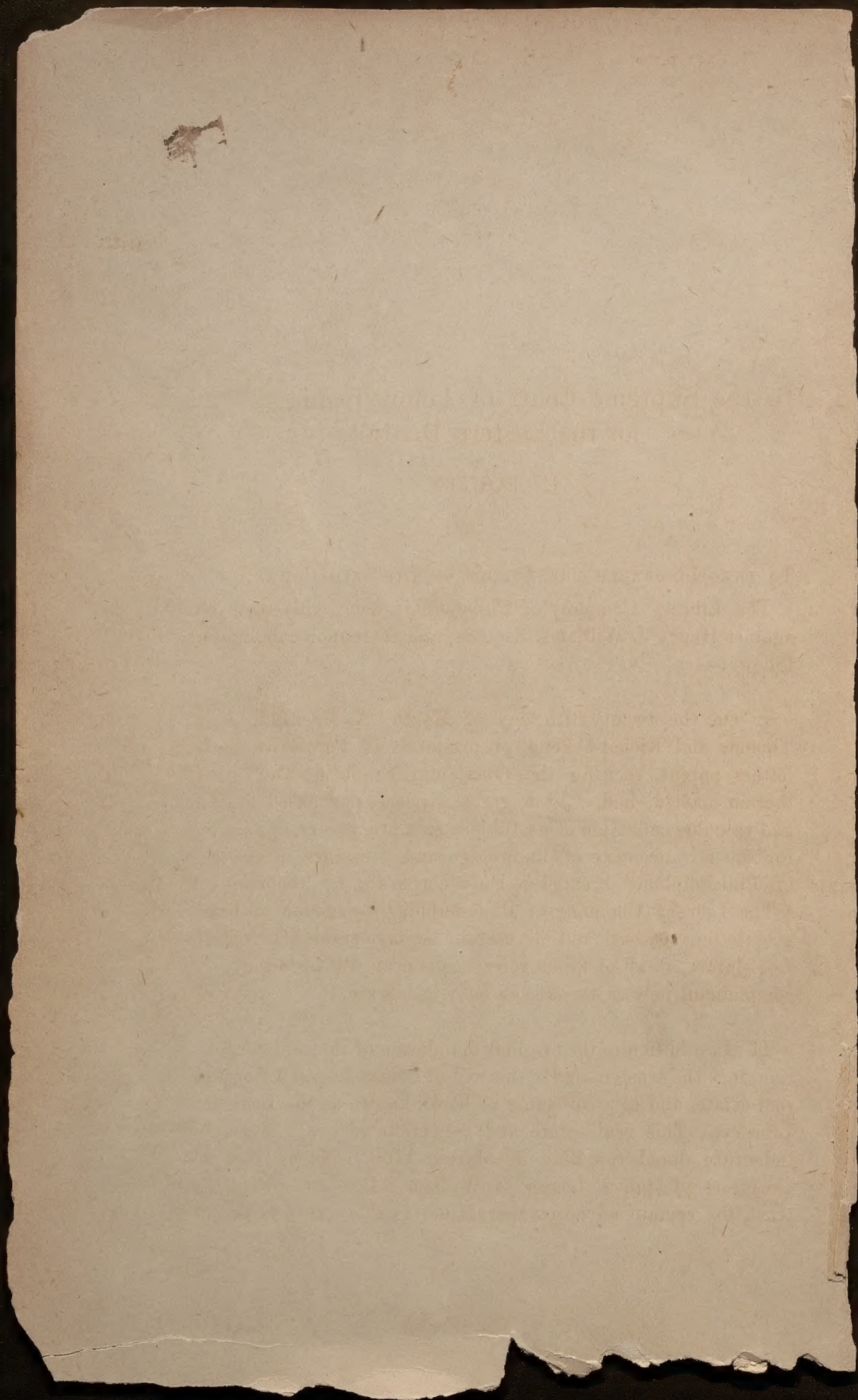
Witness our hands at Philadelphia, this 11th day of April, one thousand eight hundred and seventy-one.

WM. HENRY RAWLE,
R. C. McMURTRIE,
WM. M. MEREDITH.

NOTE.—If you fail to comply with the above directions, by entering an appearance in the Prothonotary's office within fourteen days, you will be liable to have the bill taken *pro confesso*, and a decree made against you in your absence.

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In the Supreme Court of Pennsylvania in and
for the Eastern District.

IN EQUITY.

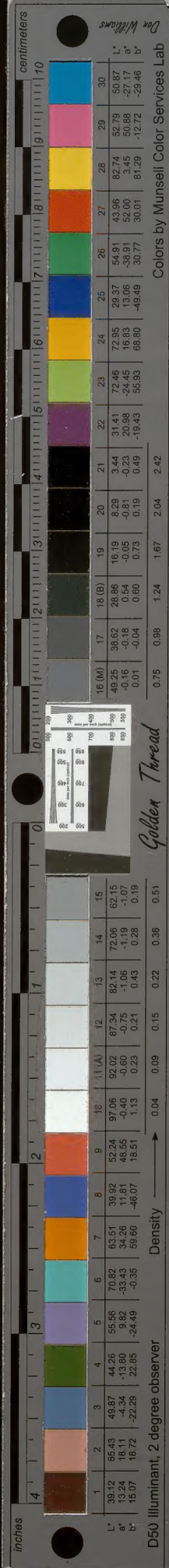
TO THE HONORABLE THE JUDGES OF THE SAID COURT:

The Library Company of Philadelphia bring this their bill
against Henry J. Williams, Esquire, and thereupon complain as
follows:—

I. On the twenty-fifth day of March, A. D. 1742, John, Thomas and Richard Penn, proprietaries of Pennsylvania, by letters patent, reciting that Benjamin Franklin, and others therein named, had, "at a great expense, purchased a large and valuable collection of useful books, in order to erect a library for the advancement of knowledge and literature in the city of Philadelphia," created a body corporate by the name of "The Library Company of Philadelphia," by virtue of which said letters patent, and of certain supplemental acts of the Legislature, to all of which reference is craved if necessary, the complainant now exists as such body corporate.

II. In addition to the original foundation of the said corporation, it is the trustee, under the will of James Logan, of certain real estate, and of a collection of books known as the Loganian Library. This real estate and collection of books were, by indenture dated the 25th of March, 1760, conveyed by the executors of James Logan to William Allen and others, in trust, for certain purposes therein set forth. An addition to

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the said collection of books was subsequently made by the will of William Logan; and, by an act of the Legislature, approved the 31st day of March, 1792, reciting that James Logan—the only surviving trustee of the said institution—had requested the Legislature that, pursuant to an agreement between himself and the directors of the Library Company of Philadelphia, the real estate and collection of books might be vested in the Library Company aforesaid: and, that power might be given to make such provisions as might most effectually tend to render the said institution beneficial to the public, consistently with the design of the founder, it was enacted that the said real estate and books should be vested in the Library Company of Philadelphia aforesaid, its successors and assigns, forever, in trust, for the support and increase of the said Loganian Library. This collection of books, of which the complainants are thus the trustee, now exceeds ten thousand volumes, and is one of the most valuable of the kind in the United States. Since the year 1793, the books have always been kept in the same building as those of the Library Company, and under the care of the same librarian. None of this collection are ever suffered to leave the building, and the same rule is, of course, observed as to rare books and manuscripts which belong to the Library Company proper.

Additions have also been made to the library by its association, in 1769, with the Union Library Company of Philadelphia, under an act of the Legislature approved on the 13th day of March of that year, to which reference is craved—in 1771, with the Associated Library Company and the Amicable Company—by a bequest, in the year 1804, by John Bleakley and the Rev. Samuel Preston—and by the bequest, in the year 1827, of the Mackenzie Library.

The number of books thus belonging to the complainants now exceeds ninety-five thousand volumes.

III. The corporation is composed of shareholders, and is maintained by their annual contributions, and from the income derived from such property as has been given to it, and from

fees paid for the use of the books from persons not shareholders.

All the profits and income of the corporation, after defraying the necessary expenses of maintenance, are applied to the purchase of books. The institution is managed by ten directors, annually chosen by the shareholders, who receive no compensation for their services, and the use of the books is given—

1. Without charge or compensation, to all persons using them within the library building;

2. To all shareholders, with certain usual limitations as to the number of volumes that may at any one time be taken for use without the building;

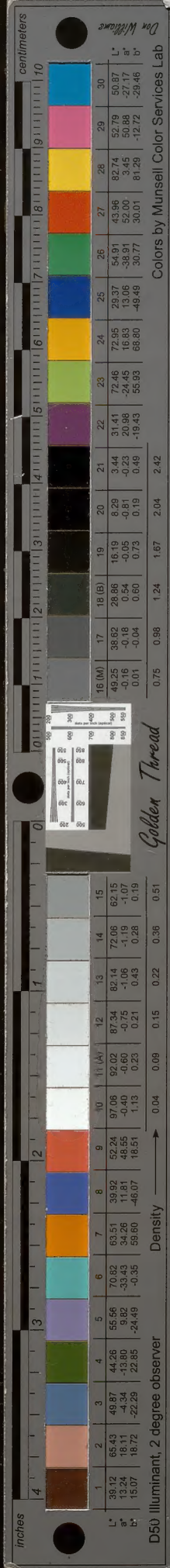
3. To all persons, for a small compensation, who wish to use the books without the building, and give security for their return.

IV. The original purpose for which the corporation was created was the collection and use of books by the shareholders at their homes, as a circulating library. It was the first of that character in this country, and has ever since preserved its character. The profits arising from subscriptions and other sources are devoted exclusively to the expenses of the library and to its increase, and are not employed for the use and benefit of the shareholders.

V. Your orators are advised and aver that they are, therefore, a corporation for charitable and literary uses, and are entitled to the aid of a court of chancery for preserving and protecting their rights.

VI. Although for many years the building of your orators, at the north-east corner of Fifth and Library streets, which was erected in the year 1793, was sufficient for the accommodation and preservation of the said libraries, yet it has ceased to be so;

See pamphlet
2 at pg 13



and, in particular, the want of a fire-proof building, to be erected in a location more central, and therefore better adapted to the wants of the community, has received the serious attention of all persons interested in the library. To this end, subscriptions have, during the last ten years, been received from a number of persons, and the sums so received, together with the proceeds of a legacy of about fifty thousand dollars, specifically bequeathed for the same object, have been invested, and now form a fund amounting to about ninety thousand dollars, which, by the terms of the said subscription and of the said bequest, it is the duty of your orators, as trustees, to apply to this particular purpose.

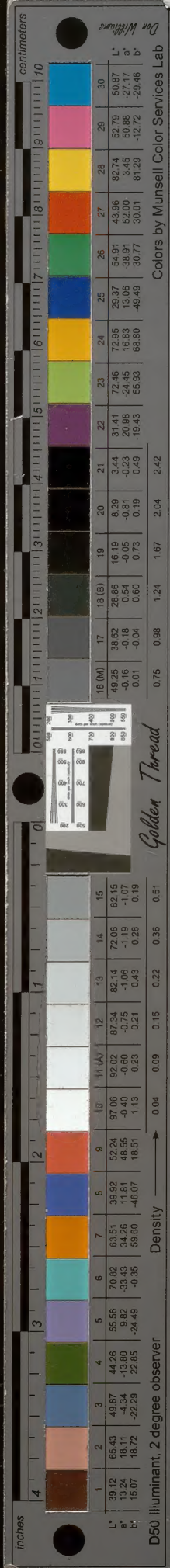
VII. Among the shareholders of the Library Company aforesaid was Dr. James Rush, a native and resident of Philadelphia. He had been himself an author; he had taken an active interest in the affairs of the library, and was well acquainted with its objects and purposes, and, in particular, with the anxiety that its books and manuscripts should be safely lodged in an appropriate fire-proof building, to be erected in some central location, and of the fact that such subscriptions and legacy had been so made and received.

VIII. For the purpose of carrying out that end, he conceived the munificent design of providing such a building for the said libraries as would enable your orators both to preserve their collections and increase their usefulness to the community; or, to use the very words of his will, hereafter to be referred to, "to make provision for the preservation, extension, and free and convenient use of a public library, without any ambitious or pretentious display." With this purpose another was subsequently blended. The testator was without children, and had survived his wife. The latter had been one of the daughters of the late Jacob Ridgway, Esq., and had received, under his will, a large fortune, which she had left, by her will, unreservedly to her husband. The testator, therefore, desired, while providing for the future of the library, to acknowledge the source

whence the means so to do had been derived, and to perpetuate the memory of Mr. Ridgway.

IX. In the accomplishment of these ends, the testator made his will, and subsequently added three codicils. In the will itself, which was dated the twenty-sixth day of February, A. D. 1860, he devised all his estate, after the payment of certain legacies and annuities, to his brother-in-law, the defendant, (who had been for many years one of the directors of the library,) his heirs and assigns, "In trust, to select and purchase a lot of ground not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race streets, in the city of Philadelphia, and thereon to erect a fire-proof building sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia, (whose library is now at the corner of Fifth and Library streets,) and to provide for its future extension according to plans, directions and specifications which I shall hereafter make or give; but if I should not make or leave any such plans, directions or specifications, then to erect the same according to his best judgment and to the views which I have expressed to him. It is my wish that this building should be exceedingly substantial, completely fire-proof, without any large, lofty, or merely ornamental halls or lecture-rooms; the whole interior to be divided in such a way as to contain the greatest number of books; to be well lighted, and so arranged as to be of easy and convenient access. And upon this further trust, as soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto the Library Company of Philadelphia aforesaid, and their successors, for the uses and purposes of their library, and for no other use or purpose whatever."

The will then contained a proviso, that, before such conveyance should be made, the Library Company should, either by an alteration in their charter, or by some other way satisfactory to his executor, bind themselves and their successors to comply with the following express conditions, and any others he might thereafter impose, under which they were to hold the said property and all the bequests and devises therein given to them:—



First.—That the Library Company should not permit any lectures or exhibitions of any kind, or formation of any museum, gallery or collection of statuary or paintings, which he, the said testator, deemed to be objects foreign to the legitimate purposes of a public library; and it was “only for the preservation, extension and free and convenient use of such a library, without any ambitious or pretentious display, that he desired to make provision.”

Second.—That all accounts of the receipts and expenditures from his estate should be kept separate from other accounts of the said company, and be headed and kept as the accounts of “The Ridgway Branch of the Library Company of Philadelphia.” And whenever the said building should have been completed and transferred to the said Library Company, and the preliminary conditions complied with, then the said testator did direct that his said executor should assign, transfer and convey all the residuary estate not expended in the purchase of the lot and construction of the building aforesaid, unto the Library Company, to be held and used by them and their successors for the following uses, trusts and purposes:—

1. To keep the real estate in good order and repair, and to make from time to time such additions to the library building as might be necessary for the extension, preservation, and convenient use of the said library and all additions thereto.

2. To set aside ten per cent. of the net income therefrom as a contingent fund, to be applied—

- a. To build upon, improve, alter and renew any real estate thereby devised to the company.

- b. To replace any loss from the failure of investments.

- c. Whenever the contingent fund should amount to thirty thousand dollars, to apply the whole surplus beyond the thirty

thousand dollars for the general purposes to which the income of the residue was directed to be applied.

3. To pay the necessary salaries of the librarian and his assistants, and the expenses of binding the books of the whole library, making cheap catalogues, and all charges incident to its care and management.

4. After complying with the previous trusts, to apply the remainder or surplus of the income, or so much as might be necessary, to the increase and extension of the said library.

X. The first codicil was dated the sixteenth day of May, 1866. By it, the said testator added and imposed the following conditions as to the said bequest:—

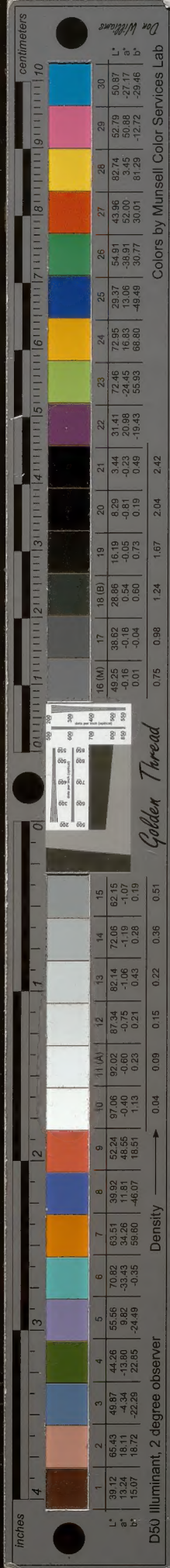
1. In order to express his respect and regard for his father-in-law, Mr. Ridgway, and his affection and gratitude to his (Mr. Ridgway's) daughter, Mrs. Rush, by erecting to their memories a monument, he directed his executor to have a marble slab placed and maintained in one of the interior rooms of the new library, with an appropriate inscription.

2. He directed his executor to have inserted in the act of Assembly which might be necessary, clauses enacting—

a. That not more than one-fourth of the directors should belong to any of the three learned professions,—law, theology and medicine.

b. That the number of shares in the library should be limited to those actually issued at the time of the testator's death.

c. That the library should not connect themselves with any other body politic or corporate, as he wished them to be free from every inducement to go beyond what he considered to be the legitimate objects of a library company.



3. He added, that his reasons for choosing the Library Company for his residuary devisee were, because it had always been conducted quietly and unobtrusively, and steadily pursuing the appropriate objects for which such libraries were established.

4. Understanding that the managers of the company had never applied any of its funds to defray the expenses of the very simple refreshments of which they were accustomed to partake at the monthly meetings of the board, but had paid for them from their personal means, he approved of this course, which he feared was not very usual, and directed that in the future no part of the funds of the Ridgway Branch should ever be used and expended for that purpose.

5. He did not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine.

6. He bequeathed all his pictures, private library, manuscripts, copyrights and papers, as also those of his father, Dr. Benjamin Rush, to the Library Company, to be safely kept in a room in the new building.

7. He directed that the building to be erected should have a basement story not less than a certain height.

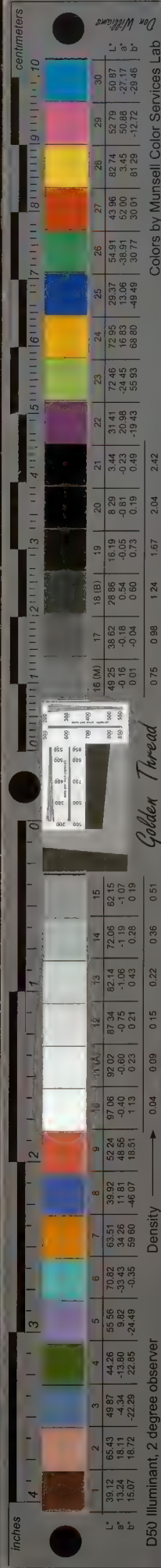
8. If the Library Company should not accept the residuary estate on the terms and conditions contained in the will and codicils, or should fail to comply with any of the preliminary stipulations therein mentioned, then the testator devised the residue of his estate to his said executor, to found and endow a public library,—entirely distinct from and independent of the Philadelphia Library,—to be named and called "The Ridgway Library," under the said stipulations and conditions.

The said codicil then contained twenty other clauses, none of which concern the Library Company, (twelve of them being private specific bequests of legacies and annuities,) except the twenty-fourth, which provided that the remains of Mr. Ridgway, of Mrs. Rush and of himself should be removed to the new library building when completed, and placed in some spot within the outward limits of the same; and the twenty-fifth, which directed that if any of the specific devisees or annuitants named in that codicil should dispute any portion of his will, their bequests should be revoked, and the same paid over to the Library Company.

XI. Another codicil was added on the eighteenth of April, 1867, which contained the following provisions:—

1. As the testator did not desire that the Library Company should have a greater income than was required to provide for the legitimate increase of the library and their current expenses, (for which purpose the sums to be set apart to secure the legacies and annuities given by his said will and testament would, he thought, be sufficient,) he authorized and directed his executor to spend the whole remainder of his estate in the purchase of a lot for the erection of the library building, leaving the said company only the income sufficient to defray the ordinary and appropriate expenses of such an institution.

2. "I have," said the testator, "in my will limited the extent of the lot to be purchased for the library building, as well as its locality; but, as I desire that it shall have not only strength, durability and accommodation, but also be of sufficient magnitude for any future or contingent, but not an ambitious or competing, increase of the library,—in order to prevent, if possible, its being torn down in twenty years, and the lot sold at a speculative profit to suit the hyperbole of the times, I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot, and select any situation he may deem most expedient, without regard to



any provision of my will or codicils. I know that an ostentatious library, to keep up with the progress of our country, collecting too many books, may be like an avaricious man who accumulates money to the ruin of both his modesty and his intellect. But I have a forlorn hope that the mind may yet be improved beyond a patronage, or even a toleration, of those crowds of graver or more puerile fictionists who mislead the idle, and of those garbling compilers who overlook or corrupt the truth of fuller and more useful works, by purloining from their pages in attempting to abbreviate and render them popular for their own advantage."

XII. Your orators are advised and charge, that, from the tenor of the said will, it is clear that the testator expected and designed that the building he directed his executor to put up would be used, if the Library Company were willing to accept the conditions imposed upon them, as a place of deposit of their own books, as well as those purchased with the funds provided by him.

They aver that there is nothing in the will of the testator tending to show a desire to interfere with, or trammel the corporation in the use of its books as a circulating library,—that is, lending them for use at the homes of the members,—or to confine either the present library, or the library bought with his funds, to being used within the building, or to encourage that mode of user.

They aver and charge that the discretion given to his executor to select the site of the intended building is in the nature of a trust for the benefit of your orators as a charitable corporation, and that the whole tenor of the will indicates that it was the intention of the testator to found a charity which should be beneficial to your orators as a library company having a collection of books, by affording or providing them a building for that purpose—that this general intent was clogged with no conditions saving such as have been already distinctly set forth, and that the power to select the site was merely incidental to the execution of that main purpose—that, on complying, or being ready to

comply with such regulations and conditions, your orators have the right to have the said powers exercised in aid of that general object and intention; and that, as it was incompetent for the testator, by verbal or unsigned directions, to revoke or vary the said gifts and trusts, so it was incompetent for him to change or affect the general intent of the will, or to qualify the powers thereby given to carry out that general purpose.

XIII. On the third day of June, 1869, notice of the probate of the said will and codicils was given by the defendant to your orators' board of directors, and on the same day, by a resolution of that board, it was "ordered that a special meeting of the Library Company be held on the 29th instant, at 12 o'clock, M., for the purpose of considering the propriety of accepting the devises and bequests contained in the will of the late Dr. James Rush, on the conditions therein expressed, and of applying for appropriate legislation to carry the same into effect."

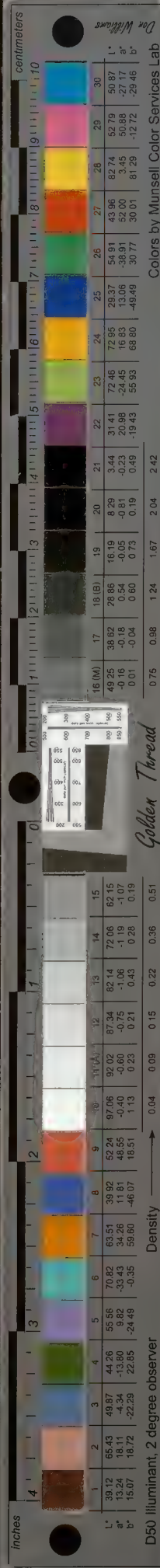
XIV. On the 29th of June, at a special meeting of the shareholders held in pursuance of the said resolution of the directors, certain resolutions which were offered at the said meeting were referred to a committee consisting of six members and six directors, to report at an adjourned meeting of the shareholders.

XV. At an adjourned meeting held on the 5th of October, 1869, a majority of the said committee reported, among others, the following resolution:—

"*Resolved*, That the stockholders of the Library Company of Philadelphia do hereby accept the legacy of Dr. James Rush, according to the terms expressed in his will."

This resolution was, with the other, referred to a stock vote, to be taken on the 19th of October.

On that day, the vote having been taken, it was reported by the tellers that on the said resolution 298 votes had been cast in its favor and 293 against it. It was thereupon resolved that the further consideration of the bequest of Dr. Rush be postponed, and that a committee of five members and the directors



should be appointed to take the subject into consideration, and to recommend such action as they might deem expedient.

XVI. At an adjourned meeting of the shareholders held on the 25th of May, 1870, the committee appointed at the previous meeting reported that the following act of the Legislature had been passed and approved:—

“Be it enacted, &c., That the Library Company of Philadelphia be, and they are, hereby authorized to act as trustees of the Ridgway branch of the Philadelphia Library, and the trusts pertaining thereto, under the last will and codicils of James Rush, late of the city of Philadelphia, doctor of medicine, upon the conditions and provisions therein contained, without limitation as to the yearly value or income of the said trust estate, but in such manner that the real and personal property of the company, including such books, pictures, statues, and other works of literature and art as now are, or hereafter shall be, held by them in their own right, or on any other of [or] different trusts, shall be in nowise affected thereby, but shall remain and be under their own entire and exclusive control and disposition; and the said company are hereby empowered, after acceptance of this act by the members of the said company, to apply from time to time to the Court of Common Pleas for the city and county of Philadelphia for such further amendments to the charter of the company as may be necessary to carry into effect the conditions and provisions of the said will and codicils in accordance with the directions of this act.”
Approved 23d February, 1870.

Whereupon the shareholders unanimously resolved to accept the provisions of the said act of Assembly, and requested the directors to apply for the following amendments of the charter of the company:—

1. “The Library Company of Philadelphia shall hereafter be held and taken to possess all such powers and capacities as may

be necessary to enable them to act as trustees under the will of the late Dr. James Rush, according to the provisions of an act of the General Assembly of the Commonwealth, approved on the 23d day of February, 1870, entitled 'An act relative to the Ridgway Branch of the Philadelphia Library.'

2. "So long as the Library Company shall act as such trustees, they shall do so under the following limitations and conditions:—

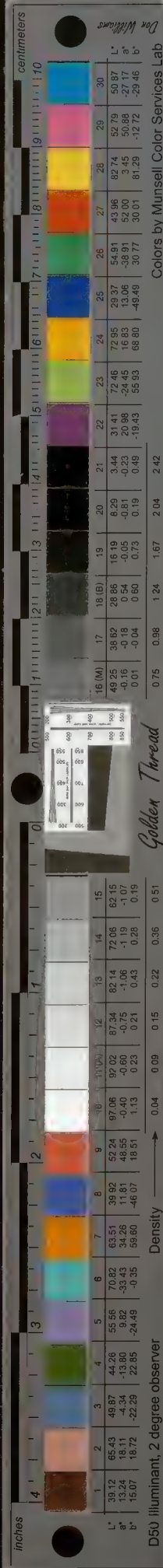
a. "Not more than one-fourth of the directors of the library shall belong to any one of the three learned professions of law, theology or medicine; but this shall not operate so as to exclude from re-election any of those who were members of the board at the time of the death of the said Dr. James Rush.

b. "The number of shares in the library shall be limited to those actually issued at the time of the death of Dr. Rush; but the managers, by their by-laws, shall have the authority to allow any respectable persons, depositing an amount, and paying an annual sum to be fixed by the board of managers, to have the full and free use of the library, as completely as if they were shareholders.

c. "The library shall not connect themselves with any other body, corporate or politic."

XVII. These amendments were subsequently, by decree of the Court of Common Pleas aforesaid, made part of the charter of the company.

XVIII. The said act of Assembly and the amendments of the said charter were necessary in order to enable the said company to effectually accept the provisions of the will and conditions attached by the testator to his gift, as your orators were advised that such acceptance and consequent modifications of the charter of the company could not be made by the mere vote of the shareholders.



XIX. Shortly after your orators had heard of the dispositions of the testator's will, they also learned that the defendant, his executor, had formed the intention to select; as the site of the building to be erected under the terms of the trust, a lot of ground at the south-east corner of Broad and Christian streets, in the city of Philadelphia, and, indeed, the fact was so stated by him at the meeting of the shareholders on the 29th of June, 1869.

XX. This site was, in the general opinion both of the directors and shareholders, an undesirable one for the purpose. It was especially undesirable as a site for a building which should contain the collection of books of the Library Company. It was believed by all to be very inconvenient for the purposes of the said company as established and used up to this time, and it was believed by much the larger number that such a site would be injurious, if not destructive, to the interests and future prospects of the company, as the remoteness of the location from the residences or places of resort of all the shareholders, or persons accustomed to make use of the books, would, practically, prevent the library being used for the purpose for which it had been founded and had always been maintained,—and hence the income derived from contributions of shareholders, without which the institution could not be supported or continued, would cease. And your orators expressly show to the court that the said proposed site is not less than half a mile south of the usual places of resort of nearly all their shareholders, and more than a mile out of the line of travel of the large majority using, or entitled to use the library.

XXI. As evidence of the general conviction of this, and of the ruinous consequences to the library, they aver that the very large number of votes, to wit, 293 votes, cast against any acceptance of the provisions of the devises and bequests of Dr. Rush—being only five less than the majority—was caused by a fear that the company would be obliged to remove their

collection to the site proposed by the defendant; and at the same meeting, of the 298 votes cast in favor of the acceptance of the gift, 256 votes were cast in favor of the following resolution:—

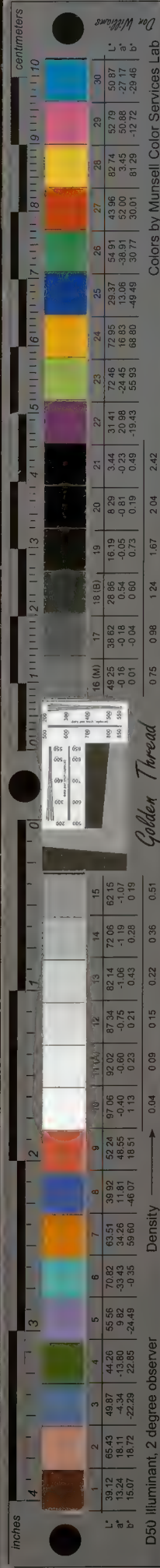
“*Resolved*, That so much of the present collection of books and other property of the company as may by the directors be deemed expedient, shall be retained in the present or some other central position for general use and circulation.”

By which it would appear, that, out of 591 votes cast, 549 were, in effect, cast against the removal of the collection of the library to that site.

XXII. Your orators, therefore, deeply impressed with the great advantages that might be derived from a proper use of the discretion given by the testator to his executor,—the desirableness of having a proper building for the preservation and use of their library in a convenient location—the waste of money consequent on the erection of two buildings so remote from each other, for one common object—the still further waste in the maintenance of two distinct establishments therefor, and the apparent violation of the cardinal intent of the testator by so doing,—used all the influence they possessed to prevent such a selection of the site by the defendant.

XXIII. As soon, therefore, as they found themselves, by reason of their acceptance of the said bequest, and the allowance of the amendments to their charter necessary thereto, in a legal position to act under the trusts of the will, they put themselves in communication with the defendant, and, at a meeting of the board of directors held on the 10th of December, 1870, the following resolution was passed:—

“That the secretary be directed to inform Henry J. Williams, Esq., the executor of the will of Dr. Rush, of the amendments of the charter of the company, and to notify him that the company is now ready to undertake the performance of their duties as trustees of the Ridgway Branch of the Library.”



And the following preamble and resolutions were also adopted:—

“WHEREAS, At a meeting of the members of the Library Company held on the 29th day of June, 1869, Mr. Williams, as executor of Dr. Rush, expressed an intention of erecting the library building contemplated by the provisions of the said will on the square of ground on the corner of Broad and Christian streets, in this city; now, further,

“*Resolved*, That it is the opinion of the directors of this company, that the removal of their collection of books to the site thus proposed would, under the circumstances, be destructive of the interests of the Library, and contrary to the wishes of a vast majority of the stockholders.

“*Resolved*, That the directors take this as the first opportunity since the company has been authorized by law to accept the trusts of Dr. Rush's will, to express to Mr. Williams their earnest hope and request that he will reconsider his intention of building on the site named.

“*Resolved*, That Dr. Willing, Judge Hare and Mr. Lea be appointed a committee to communicate these resolutions to Mr. Williams, and to confer with him on the subject.”

XXIV. At and before this time, your orators had learned that the defendant, in making the selection of the said site at Broad and Christian streets, was not acting either under the directions of the testator as contained in his will, nor in the proper and legal exercise of the discretion which the will had given to him, but that before and at the time when the said will was admitted to probate, he had disqualified and disabled himself from exercising any discretion whatever in the premises.

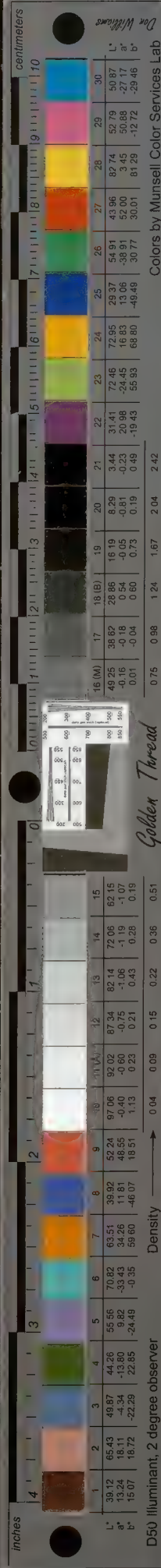
XXV. The mode or circumstance by which he had thus disabled himself was this, viz.: he had bound himself, by a most solemn verbal promise, made to the testator in the extremity of his last illness, and within a month of his death, not to exercise any discretion at all, but to use a particular piece of ground, and no other, as the site of said building.

XXVI. As evidence of this, your orators show to the court the following facts:—They have already referred to a special meeting of their shareholders, which was held on the 29th of June, 1869. At that meeting the defendant was present, and he then verbally mentioned his determination to place the said library on the Broad street lot. After the meeting, being strongly urged by the committee to change that site for another equally good, and in a more central location, he, in order to relieve himself from the pressure thus put upon him, assigned, among other reasons for his determination, that a loss to the estate would ensue if the lot was not used for that purpose. In answer to this, it was at once arranged that any such loss would be met by voluntary contributions in relief of the estate; whereupon the defendant declined the proposition, and announced his final determination to place the building upon that lot, under all circumstances and regardless of all consequences, unless prevented by a court of competent jurisdiction.

XXVII. As further and conclusive evidence in this behalf, your orators show that, in answer to a letter from Dr. Willing, the chairman of the said committee appointed on the 10th of December, 1870, the following communication was received from the defendant:—

CHESTNUT HILL, Dec. 30th, 1870.

MY DEAR DOCTOR:—I did not intend my note of the 17th instant to be a formal reply to the resolutions of the directors of the Library Company, nor to prevent the committee from having the conference they requested. So far from it, that I mentioned both time and place at which I would have been happy to meet them. I cannot, however, conceal my conviction, that nothing they would say would change my intention of placing the Ridgway branch of the Philadelphia Library on the lot purchased by Dr. Rush for its site; and, after all that has taken place, I must confess I am a little surprised that they should again ask me to do so. Judge Hare and yourself must both be fully aware (for I have stated them, I believe,



both orally and in writing) of the circumstances connected with the selection of that lot for this purpose; but, as Mr. Lea, one of your committee, is a new member, I shall repeat them, even at the risk of being unnecessarily tedious in my answer; for I cannot believe the directors could expect *me* to make the change they desire, if they fully appreciated my position.

Some weeks before Dr. Rush's death he was very anxious to have the location of the intended building finally fixed and settled; and he desired me to ascertain the size and cost of all the vacant lots on Broad street, on which street he desired it to be placed. I procured statements of the sizes and prices of all I thought at all suitable, from Vine to South street, but he was satisfied with none of them. Another gentleman brought him a plan of the lot on Christian street, and he was so much pleased with it that he directed me to buy it at once. I did so; and when the contract was signed and a part of the consideration paid, he expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. Some days after, he recurred again to this subject, as it had probably occurred to him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would *build the library on that lot, and nowhere else*. I gave him this promise as fully and solemnly as language could express it, and he then thanked me and said he could now die in peace. Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the management of his whole estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so, were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?

And what is the reason assigned why I should do this?—"to gratify the wishes of the shareholders." But have these share-

holders shown such an appreciation of the magnificent gift of Dr. Rush (which is only subject to their future acceptance) as to render his representative very desirous to comply with their wishes, in opposition to the repeatedly and earnestly declared intentions of Dr. Rush, and to his own deliberate judgment? When the question was first presented to them, these shareholders, by a majority of five, accepted his bequest, but, by a very much larger majority, refused to pass a resolution expressing their gratitude for his gift. True, at a subsequent meeting they adopted such a resolution, but it was only on second thoughts; and it may be doubted whether it was not agreed to because of the extraordinary position in which they would be placed, if they were to take his money and refuse to admit they were obliged to him.

I have said that to assent to the wishes of the shareholders would be in opposition to my own deliberate judgment, and I mean this in its fullest extent. I think that, considering its size, its price, and the description of library Dr. Rush intended to endow, there is not an attainable position on Broad street, of sufficient size to meet his views, which is preferable to the one he has himself selected.

Now, the Library Company give me notice that the company "are now ready to undertake the performance of their duties as trustees for the Ridgway branch of the Library,"—*duties* and *trusts* which I understand commence only when the building is finished; but I am not aware that they have shown, in any one instance, a disposition to comply with the last instructions of one whom I shall always consider as their munificent benefactor.

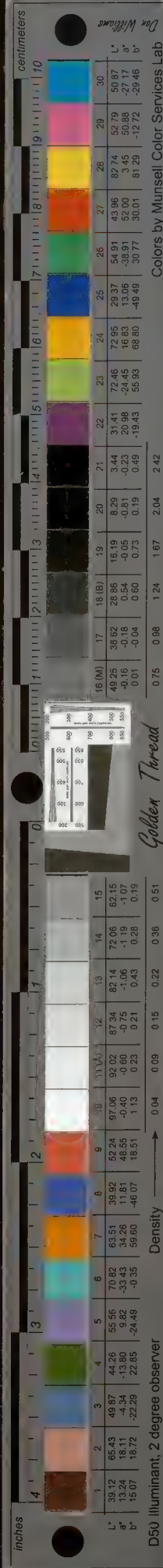
* * * * *

Very truly yours,

H. J. WILLIAMS.

Dr. CH. WILLING, Chairman.

XXVIII. While your orators are ready to appreciate the high moral conviction which the defendant feels, of his duty to abide by the promise thus made by him to his testator, and to



fulfill the same, yet they are advised that it cannot be thus fulfilled to the prejudice of your orators, for the following reasons:—

They are advised, and they so submit to the court, that all discretionary powers given to trustees are themselves trusts, and that in the exercise thereof the trustee is bound to use the same for the furtherance of the purpose for which they were given, and not otherwise; that, in the exercise of discretionary powers, the donee thereof cannot and must not act under the influence of motives other than such as should of right direct him in dealing with property not his own, and entrusted to him for a special purpose, and that if he be disabled from using his natural, unbiased discretion or judgment in the exercise of the power, from any cause which binds or warps, or has a manifest tendency to warp the same, a court of equity will interfere to restrain such abuse of the trust, and to direct what should be done by such trustee according to a sound and unbiased discretion.

And they are further advised that the discretionary power given to the defendant by the will and codicils of the testator was in the nature of property of your orators, inasmuch as its exercise will vary and modify their rights, and will certainly, if exercised according to the defendant's expressed intention, destroy or greatly impair the usefulness of the literary charity to be administered by them—that the verbal directions of the testator, varying the nature of the trust and confidence reposed by him in the defendant, and the rights which your orators, as devisees, had in the beneficial enjoyment of the exercise of that power, were as absolutely null and void as those of a stranger,—first, by reason of being made within one calendar month prior to the death of the testator, and, therefore, void under the statute in such case provided—and, secondly, by reason of their not being in writing and signed by the testator at the end thereof, in accordance with the statute relating to wills.

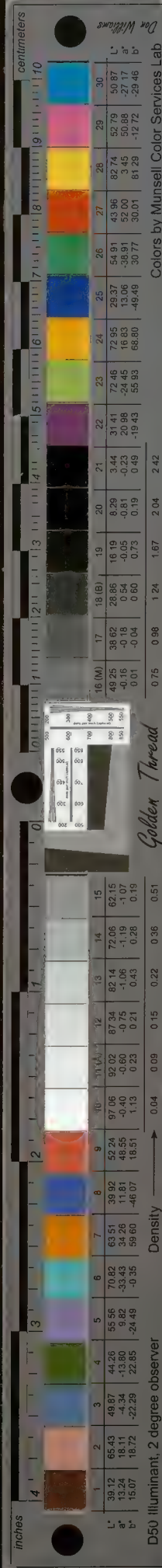
And they are further advised that, under the circumstances of this case,—while it is true that a court of equity will not

interfere with a trustee in the exercise of a discretionary power, (save to see that a discretion is really exercised,) yet, that looking to the fact that the object of this testator was to found a charity of this particular sort—a literary charity—by furnishing it with books and maintaining said building, and that it was certainly designed that your orators should administer that charity in connection with their own, and under one management, and, it was probably intended, in one building, and with one corps of servants and assistants,—a court of equity, having control of charities, would, even if the donee had not so surrendered and bound his discretion before the trust had vested in him, interfere to prevent its improper exercise.

XXIX. Your orators aver that nothing but the high moral conviction under which the defendant labors—of his duty to abide by his promise—blinds him to these consequences. And although true it is that the promise so made by him to his testator was wholly illegal and could not lawfully bind the former nor be enforced against him, yet your orators charge that the defendant did and does believe that his conscience was and is bound thereby, and that he would be doing a dishonorable act if he made any other selection.

XXX. But the defendant at times insists that he has selected the said site in the exercise of *his own* discretion, unbiased by said promise; but your orators charge that the defendant, having made the promise and believing himself bound by it, was and is utterly unable to determine what line of conduct he would have followed if he had not made such promise, and that a court of equity will not regard any assertion of what might or would have been the defendant's determination, had no such influence existed.

XXXI. At other times the defendant alleges, as an excuse, that, as the testator agreed to buy the said lot for the purpose of having a library building erected thereon, he, the testator, did thus *himself* select the site for the building; and that he, the



defendant, as trustee, had not the less a right to select voluntarily the *same* lot which the testator had thus selected, or else that the testator's alleged selection, in some way or other, took the place of that to be made by the defendant, and was either binding, or could, at his option, be made binding, and, in fact and law, has been made binding, on all claiming under the will; the contrary whereof your orators charge to be true, and they aver that, by his own showing, it was not possible for the defendant, after the testator's death, to make a voluntary selection of that or any other site, because he had already, in the testator's lifetime, bound himself by his promise not to exercise the discretion which the will had given him, but to build the library on that site, and nowhere else.

XXXII. Your orators further charge that to permit such an alteration of the testator's will to be made by parol, would be a mere evasion of the statute of wills—that such attempted alteration cannot be strengthened by the mere purchase by the testator of a lot of ground, unaccompanied by a written declaration, signed by him, of the purpose for which it was so bought—and especially when, by the law of the land, such an alteration of the will, even if otherwise made in the most lawful and binding manner, would be wholly void and of no effect, by reason as aforesaid of having been made within one calendar month prior to the testator's death.

Wherefore, every act and declaration both of the testator and of the defendant in reference to the determination or selection of the said lot at the south-east corner of Broad and Christian streets, as a site for the building to be erected under the trusts in the will contained, is wholly nugatory, void, and ineffectual for that purpose.

XXXIII. And they charge that the site selected is utterly ruinous and destructive of the general purpose for which your orators were incorporated and endowed, and the trust which they have been hitherto administering, and which it was the manifest design of the testator to promote, in this,—

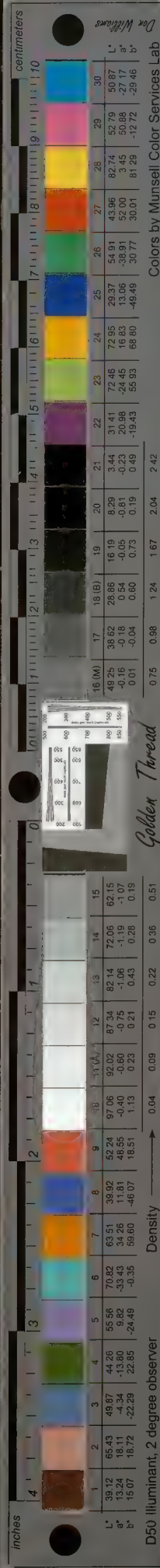
that it compels an election not authorized by the will, on the part of your orators, either to place their collection of books where it will be utterly or comparatively useless to their shareholders, or else lose the benefit of the intended gift of the testator to them of a building to contain their books and property; and that it is apparent, from the facts already set forth, that the proposed selection of the site by the trustee—even if it were made under an unbiased discretion—is so evidently disadvantageous to the object proposed by the testator, so injurious to his intended beneficiaries, and so contrary to their wishes, that this court will interfere and control the defendant in regard to the selection of the site, or see that a place is selected which will not be injurious to the objects for which the power was conferred. And your orators charge that the vote of the stockholders accepting the said act of Assembly, and authorizing the amendments to be obtained to their charter, was a distinct election on their part not to allow their collection of books to be removed to the building to be erected by the defendant, if placed on the proposed site on Broad street.

XXXIV. Your orators further show that the selection of the said site will not only be destructive of their own interests as aforesaid, but will also frustrate the main intent of the testator.

The tenor of the will contemplates that the library shall not be free, and that its income shall be derived from the use of the books of your orators, at least for some years to come, nor is any other fund provided by the testator for the purchase of books.

By the second codicil of the said will, the testator provided as follows:—

“*First.*—I have given and devised the greater part of my estate to my executor for the purpose of erecting for the Library Company of Philadelphia a building not only large enough to contain their present books, but also their probable increase for many years to come. Now, as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate (not a competing) increase



of the library and their current expenses—not to be so large as to invite extravagance and waste),—for which purposes the sums to be set apart to secure the legacies and annuities given by my said will and testament will be sufficient,—I hereby authorize and direct my said executor to expend the whole remainder of my estate in the purchase of a lot and the erection of the library building, construction of book-cases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution.”

According to a literal construction of this clause, the testator permits no part of his estate to be employed in the maintenance of the library, or in the purchase of books, except the income of the fund to be set apart in the first instance for the payment of the annuities when and as these annuities shall fall in. He judged that the funds of your orators would be sufficient in the meantime, but they aver that this will not be the case if two separate buildings and establishments are to be kept up. They charge that the aggregate amount of annuities and legacies given by the said will and codicils will require to be set apart a fund of about \$200,000; leaving for the ultimate support of the Ridgway branch, if sustained as a distinct institution, only about \$11,000 a year, which would scarcely pay the taxes and current expenses.

If, however, by a liberal construction of the said clause of the codicil, the testator intended that his executor should not only erect the proposed building, but should set apart a fund to be held by your orators for the payment of taxes and current expenses for repairs and maintenance, for salaries of officers, and the publication of the testator's works, as prescribed by his will, (for which not less than \$200,000 would be necessary,) then your orators charge that the character of the building which the defendant proposes to erect is such as to defeat that intention entirely. For they aver that the defendant, acting on conversations held with the testator in his last illness, and drafts and sketches left by him,—which the defendant alleges are binding on him, but which your orators charge are not so in point of law,—has, without consultation with your orators' directors,

determined on a plan of building to be so erected, the cost of which, and the equipment thereof as proposed by him, cannot, as your orators aver, be less than \$700,000. The inventory of the testator's estate, as filed by the defendant for the purposes of the collateral inheritance tax, amounts, in the aggregate, to \$1,110,717

From this must be deducted:—

Collateral inheritance tax,	\$50,369
Commissions, expenses, &c.,	40,833
Cost of the lot at Broad and Christian sts.,	130,000
Annuity fund,	200,000
	<hr/>
	421,202

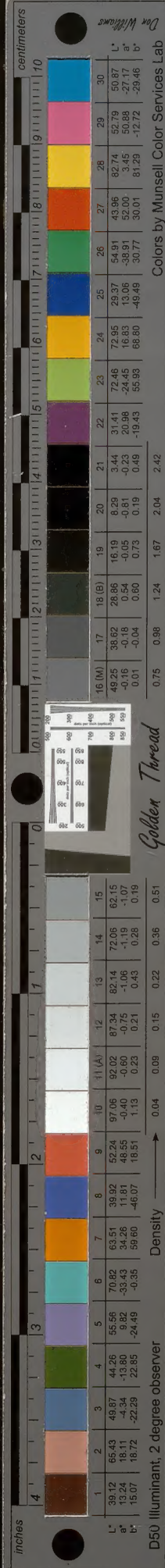
Leaving for the building and its equipments, \$689,515
which is less than will be necessary for the erection of the building and its equipment as the defendant proposes to erect it.

On the other hand, your orators aver that their net income is as follows:—

From investments, rents, &c.,	\$3,804 94
Annual subscriptions,	4,981 39
Miscellaneous,	58 14
	<hr/>
	\$8,844 47
Deduct salaries and current expenses,	4,193 01
	<hr/>
Leaving for books and contingencies,	\$4,651 46

In the above statement no allowance is made for yearly taxes, the library building being for the present exempt by law.

XXXV. If the two collections can be placed in one building, and that on a site which, by its convenience of access, will compare with the other libraries of the city, the superior inducements it would offer would, by increasing the number of persons resorting to it, increase the income, and thus afford a large revenue for the increase of the collection, now manifestly inadequate to the wants of such a community as this. But if the collections are to be separated, the income of



your orators from all sources will be entirely inadequate for their maintenance and ordinary expenses, and no further purchase of books will be possible until, by the death of the annuitants, the annuity fund should come into possession, which may not be for many years. And as the income is mainly derived from subscriptions, the result may be, that a great number of the shareholders will, under such circumstances, refuse to pay the same, and allow their shares to become forfeited, which will still further diminish your orators' resources. If, therefore, the defendant should proceed in the erection of the building as proposed by him, your orators charge that the cardinal intention of the testator, as set forth in his will and codicils, will be defeated.

XXXVI. Your orators are advised that being the trustees to execute this charity when the building is completed, they are bound to consider the consequences of the proposed and threatened action of the defendant, and that it is their duty to apply for relief to this court, having jurisdiction over charities and trusts.

XXXVII. Wherefore they pray equitable relief as follows:—

I. That the rights of your orators and of the defendant in the premises may be ascertained and declared.

II. That it may be declared and decreed that the power conferred on the defendant by the will of the testator was a trust to be administered by him only in the manner in which all trusts can or of right ought to be administered.

III. That the defendant may discover the present condition of the estate of the said testator, and what plans and specifications, if any, he has procured for the erection of the proposed building at the corner of Broad and Christian streets, and what will be the probable cost of such building.

IV. That the Court may decree and declare that the defend-

ant, being, at and before the time when the said trust vested in him, or supposing himself to be, under an obligation which bound his discretion as to the selection of a site for the said building, was and is thereby disqualified from and incapable of exercising the power and trust in that behalf given to him by the said will, and that the same may be exercised by this Court having jurisdiction in the premises.

V. That it be referred to a Master, to inquire and report what would be a proper and fit location for the said building, to the end that the true intent and purpose of the testator, as contained in his will, may be carried into full effect.

VI. That the Court may from time to time give such further instructions, and make such further orders and decrees in the administration of the trust, as to them shall seem fit; and especially that it may declare how much of the *corpus* of the estate shall or ought to be expended and employed in the purchase of a convenient lot of ground and the erection of a suitable building thereon.

VII. That the defendant may be restrained by injunction, preliminary until the hearing and perpetual thereafter, from proceeding to erect the said building on the said lot situate on the south-east corner of Broad and Christian streets.

VIII. General relief.

WM. HENRY RAWLE,
R. C. McMURTRIE,
WM. M. MEREDITH,
For Complainants.

